No. 11037

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES H. COLLINS, SIDNEY FISCHGRUND and CHRISTOPHER E. SCHIRM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record
In Three Volumes
VOLUME III
Pages 601 to 618

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11037

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES H. COLLINS, SIDNEY FISCHGRUND and CHRISTOPHER E. SCHIRM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Three Volumes

VOLUME III

Pages 601 to 618

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 661 Howard Street, San Francisco

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 15229—Criminal

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

JAMES H. COLLINS, SIDNEY FISCHGRUND, and CHRISTOPHER E. SCHIRM,
Defendants and Appellants.

ASSIGNMENT OF ERRORS BY SIDNEY FISCHGRUND, JAMES H. COLLINS and CHRISTOPHER E. SCHIRM.

Come now the above-named defendants and in connection with the Appeal herein say and each of them says:

That in the record and proceedings prior to and during the trial of the above-entitled cause in said District Court, error has intervened to their and his prejudice and make the following Assignment of Errors which they aver occurred in the trial of said cause, to-wit:

I.

Said District Court erred in denying their motions to quash the indictment herein upon each and all of the grounds set out in said Motion to Quash, and requiring them to plead to the said indictment.

II.

Said District Court erred in denying their motions for an early trial of said cause.

III.

Said District Court erred in denying their motions to dismiss said indictment made prior to the time when said cause was called for trial. The grounds of said motions were, and the grounds of said error in denying said motions were and are those set out in said motions to dismiss. [1*]

IV.

Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, on each and all of the counts in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is, insufficient to hold them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, to answer any of the counts in said indictment.

V.

Said District Court erred in denying their motions made by them at the close of all of the evidence in the case, to dismiss each and every count

* Page numbering appearing at foot of page of original certified Transcript of Record.

of the said indictment, and to acquit them on each and every count in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were, and are, that the evidence adduced was and is insufficient to hold them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, and would not and does not tend to prove that the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm are guilty in any manner or form as charged in said indictment or any count thereof.

VI.

Said District Court erred in entering judgment against and in pronouncing sentence upon the said defendants, Sidney Fischgrund, James H. Collins and Christopher E. Schirm, in that the matters and things alleged in said indictment or in any count thereof do not constitute an offense against the laws of the United States. [2]

VII.

The District Court erred in denying the motions made by the said defendants after the jury had returned its verdicts in the above-entitled cause, for an order arresting the judgments on Count XI in said indictment.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that said Count XI in said indictment does not state facts sufficient to constitute a punishable offense or any offense or crimes against the laws, or

any law, or against the constitution of the United States, and particularly said Count XI does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

VIII.

Said District Court erred in denying their Motions to Vacate the Judgment of Conviction and Discharge the Defendants Notwithstanding the Verdicts.

The grounds of said Motions were and the grounds of said errors in denying said motions were, and are, that the verdicts of the jury finding them guilty as charged in Count XI of the indictment, were and are contrary to law and not supported by the law and the facts involved in these proceedings.

IX.

Said District Court erred in overruling the objections of said defendants to the admission in evidence, and admitting in evidence Government Exhibit No. 6, the minutes of Union Associated Mines Company which were identified by the witness Truman. The grounds of the objections and the exceptions were as follows: Mr. Blue: If the Court please, I have no objection so far as the foundation is concerned except that on behalf of the other defendants I object to the minutes as set forth on the ground it is hearsay as to them, and there is no foundation as yet laid as to in any way [3] connect any of the defendants with the preparation of these

minutes, and I therefore urge that objection to them.

Mr. Evans: Do I understand you correctly, Mr. Blue, that you are stipulating on behalf of all of the other defendants that the——

Mr. Blue: They are the minutes. There is no question about that.

Mr. Evans: ——Union Associated Mines Company and may be introduced subject to their objection as to their competency and relevancy and materiality?

Mr. Blue: And it is definitely hearsay as far as the other defendants (except Morgan) are concerned.

The Court: All right. They may be received.

Mr. Blue: Exception. (Tr. 94-95)

X.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Harold V. Dodd, as to the oil production in the Devil's Den area in California, the grounds of the objections and the exceptions being as follows:

By Mr. Manster:

What is known generally as the Devil's Den area embraces about two or three townships and embraces 12 to 18 sections, a section being 640 acres (Tr. 665). At any time during 1938 the highest number of wells producing in that area was 20.

Q. Can you tell us what was the total amount of barrel production from those 20 wells?

Mr. Cannon: I will object to that as being immaterial altogether. (Tr. 666)

* * *

The Court: Well, what we are primarily interested in is the value of these 40 acres, and all you attempt to show first by the witness is that this well has been drilled within three-quarters of a [4] mile away.

Mr. Manster: That is right.

The Court: And therefore we were to draw whatever inference we could from that as to the value of this land, and subsequently, on cross-examination, the witness said that it wouldn't make any difference.

Mr. Manster: We contend that is some indication of the probability of finding oil. If a dry hole is drilled within three-quarters of a mile in a particular area, we contend it is some indication as to whether or not oil in productive quantities would be produced.

Now, it has been brought out here that certain areas, certain acreage in the Devil's Den area have produced oil, and we would like to show just what the production was in 1938 and 1939.

Mr. Cannon: Then I will add to my objection heretofore given that this is an attempt to impeach his own witness.

Mr. Manster: No, I am not impeaching him at all. I am merely asking for his records.

The Court: Go ahead.

Mr. Cannon: Exception.

The Witness: 9,094 barrels. (Tr. 667-668)

XI.

That said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Paul Julian Howard, as to the assessed value of certain land in Kern County, California. The grounds of objections and the exceptions were as follows:

Q. Now in pursuance of your official duties, did you make a valuation of the oil and mineral rights of that tract known as the northeast one-quarter of the northwest one-quarter, Section 2, [5] township 25 south, range 18-E in Kern County, California?

Mr. Cannon: I will object to that as being immaterial, and no foundation having been laid.

Mr. Manster: I am limiting it to 1939 at the time.

Mr. Cannon: I will object, then, on the further ground——

Mr. Manster: I beg your pardon. It is 1938.

Mr. Cannon: I will object, then, on the further ground that there is no issue in the indictment towards which this testimony would have the slightest probative value. We are not charged with selling land for something more than it was worth, nor making any false representations to any person as to its value. It is not part of the scheme alleged. (Tr. 728-729)

Mr. Manster: We maintain it is material on the allegations of the indictment which states that these defendants leased and assigned unproven and undeveloped properties.

Mr. Cannon: It does not go to the value. It goes to the proven or unproven.

Mr. Manster: We maintain, Judge, that the valuation of oil and mineral rights placed by the responsible State official who is charged with that function, is extremely relevant and material on the issue of whether this particular tract was proven and developed or not.

Mr. Blue: May I say something? Pardon me, Mr. Cannon. There is no witness that has appeared to justify any assumption that there was any representation made that this land was proven and/or developed.

Mr. Cannon: That isn't the point that I am making now.

The Court: That isn't the point. (Tr. 729)

* * *

Mr. Cannon: The point I am making now, Mr. Blue, is that there is no allegation here with respect to any part of the scheme having [6] anything to do with the value of the land.

The Court: Well, only in connection with whether it was proven or unproven.

Mr. Cannon: I say the assessed value.

The Court: If it were proven, I suppose it would have a higher assessed value.

Mr. Cannon: Probably.

The Court: You can limit it to what he based his valuation on.

Mr. Cannon: Of course, I will submit to your Honor's ruling, but reluctantly, and take an exception, and I would like the objection to stand as to this entire line of questioning covering this tract. (Tr. 729-730)

XII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Frank L. Tucker, concerning conversations he had with one Murphy and concerning disposition made by the said witness of certain stock in Union Associated Mines Company. The grounds of the objections and the exceptions were as follows:

Q. And tell me, if you will, the conversation between you and Mr. Murphy with relation to the Union Associated Mines stock.

Mr. Cannon: Objected to, if the Court please, on the ground it is hearsay. It can have no bearing on the issues in the case. May I ask a question on voir dire?

The Court: Yes.

Mr. Cannon: Did you ever talk to any of the defendants before you bought any of this stock?

The Witness: No, sir.

Mr. Cannon: Or with Mr. Adkisson or Mr. Barclay?

The Witness: No, sir.

Mr. Cannon: I object on the ground it is hear-

say, no proper or any foundation is laid for it at this stage of the proceedings. [7]

The Court: He may answer.

Mr. Cannon: Exception. May I have an exception running to it all, if the Court please?

The Court: Yes. (Tr. 869)

* * *

Q. By Mr. Evans: Mr. Tucker, do you still have the stock of Union Associated Mines Company which you purchased?

A. No, sir.

Q. What did you do with it?

Mr. Cannon: I will object to that as being immaterial.

The Court: He may answer.

The Witness: I took a note from the Plymouth Oil Company. (Tr. 883)

* * *

Mr. Cannon: I will move to strike the testimony of this witness heretofore given with respect to what happened to the stock. It is long after the date laid in this indictment, May 1, 1941.

The Court: It may stand.

Mr. Cannon: It may stand?

The Court: Yes.

Mr. Cannon: Exception. May I add to that objection, and may it be deemed to have been made before the ruling, that it is hearsay as to all the defendants?

The Court: Yes. (Tr. 884-885)

XIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Frank Veloz, concerning certain conversations had by the witness with one Murphy. The grounds of the objections and the exceptions were as follows:

Q. Tell us what Mr. Murphy told you with relation to the securities [8] of the Union Associated Mines Company?

Mr. Cannon: Pardon me just a minute, Mr. Veloz.

The Witness: Yes.

Mr. Cannon: If the Court please, I make an objection to this testimony on the ground it is hearsay as far as Mr. Collins is concerned, whom I represent, and also it is hearsay as to all the other defendants in this case, and I object on that ground.

The Court: Very well. Overruled.

Mr. Cannon: May I have an exception?

The Court: Yes.

Mr. Cannon: And may I have an understanding that the objection runs throughout the testimony of this witness with respect to the stock and also all other matters as being hearsay, and an exception taken?

The Court: Yes.

Mr. Cannon: Thank you. (Tr. 957-958)

XIV.

Said District Court erred in denying the motions

to strike certain evidence from the record made on behalf of each of the defendants. The grounds of said motions and the rulings thereon and the exceptions taken thereto were as follows:

Mr. Cannon: If the Court please, at this time I want to make some special motions to strike, if I may have the Clerk's list of exhibits?

First, I want to move to strike on behalf of all defendants, to strike from the record Exhibit 41 in evidence, copies of a log of an oil or gas well, Division of Oil and Gas, on the ground that no proper or any foundation has been laid for the introduction in evidence of that document; on the further ground that on its face alone it shows to be incompetent, and on the further ground that it is a narrative of past event.

They are copies, not the originals. No witness has [9] produced to identify them except the fact that they got them from Plymouth Oil office. They are dated September 26, 1939, purporting to set up what occurred on December 14, 1938. (Tr. 1069)

They are not signed by any witnesses produced. One of them bears no signature, typewritten or otherwise, and the other one, attached to the sheet, is dated June 20, 1939, purporting to reflect what occurred on February 28, 1939 (Tr. 1070)

Do you want to rule on them separately, or shall I make them all at one time? May I pass this to the bench? It is hearsay as to all the defendants.

The Court: There is one that bears the signature of Mr. Lacy.

Mr. Cannon: But the signature has never been

identified. The witness was never produced. No person was offered as a witness to testify as to the regularity of the keeping of the document or the circumstances under which it was prepared, or where the original was filed.

I insist on all of them, but the primary objection is that it purports to be a narrative of past events.

The Court: I will deny your motion.

Mr. Cannon: Exception. I move at this time to strike Exhibit No. 27, which is a check No. 191, dated January 7, 1939, given to John McEvoy for $100, signed by Mathilda M. Klinger, and also Exhibit No. 28, a check of March 1, 1939, given to Mr. McEvoy for $20, signed by Mathilda Klinger, and Exhibit 29, certain stock certificates of Union Associated Mines Company, being stock certificates delivered to Mathilda M. Klinger on the ground that each and all of those exhibits are hearsay as to these defendants, and to all of them, there being no connection shown with those checks, receipt of the money for the stock, or delivery of the stock by any of the defendants to that witness. (Tr. 1071)

The Court: Your motion will be denied.

Mr. Cannon: Exception. [10]

* * *

Mr. Cannon: I move to strike Exhibit No. 50 which is a check of Fred L. Hunter for $147.50 to R. L. Colburn, it being hearsay as to all the defendants and incompetent, irrelevant, and immaterial, and no proper foundation laid for it.

I can relate the circumstances, if your Honor is not familiar with them.

The Court: I don't recall that. (Tr. 1072)

Mr. Cannon: That is the transaction where Mr. Tucker said he had the transaction with Colburn & Company, and that Murphy suggested to him that he place an order through some brokerage, and when he asked him if he had any preference and Tucker said that he had not, the order was placed with Colburn & Company. He made the check payable to Colburn. Murphy is not even an alleged co-conspirator. It would clearly be hearsay as to all these defendants.

The Court: Do you remember where that testimony was?

Mr. Cannon: I can't give you the page, but I can give you the day he testified on it.

Mr. Manster: I have it right here, Judge. The specific testimony with respect to this check is at page 881.

The Court: I will read it.

Mr. Manster: However, the testimony is that it was at Murphy's suggestion that the order for 5,000 shares, for which this check was given, was placed by Murphy with Colburn, and I think Mr. Cannon stated correctly that Mr. Tucker had no preference for any dealer through whom this transaction should be effected, and he permitted Murphy to select the dealer, and of course, Murphy was connected in this case with Collins in this particular transaction, and with this investor witness through the defendant Collins.

Mr. Cannon: There is no evidence of that. It was not proven. (Tr. 1073)

The Court: There isn't any evidence of this portion of the stock [11] delivered by Associated to Plymouth, was there, on the open market?

Mr. Manster: No, but the pertinent evidence is this. Page 876 of the transcript:

"a. Well, Mr. Murphy said there was some stock in Salt Lake that they wanted to pick up and he would rather pick it up through some brokerage firm, and suggested that I bid 2½ or 2¾, and he asked me if I had any objection to what brokerage firm he put the order in through, and I told him I did not. So, when it was confirmed that—when the sale was confirmed, I gave him the check to deliver to the brokerage firm and he picked up the stock."

The sale was effected at the suggestion of Murphy through the brokerage firm which Murphy selected. (Tr. 1074)

The Court: Well, I will deny that motion temporarily, but I will look into it.

Mr. Cannon: Exception. May it be deemed that I have made the same motion to strike Exhibit 52 upon the same grounds, it being the R. L. Colburn purchase order.

The Court: That is a part of that same transaction?

Mr. Cannon: Yes.

The Court: The motion will be denied.

Mr. Cannon: Exception.

* * *

Mr. Cannon: I move to strike the testimony, all the testimony of the witnesses Klinger and Walker, on the ground that there is, so far as defendants Collins and Morgan are concerned, and Mr. Fischgrund and Mr. Schirm on the ground that the testimony is altogether hearsay as to them, it not appearing they had any connection with the transaction at all and were not present at conversations (Tr. 1075) had or representations made at any of these conversations, [12] and if that motion may be deemed to be made without referring to the book and page of the transcript, because I don't have the transcript, and I can't do it.

The Court: That motion will be denied.

Mr. Cannon: Exception. I move to strike the testimony, all the testimony of the witness Tucker on the ground that it is hearsay as to all of the defendants and no proper or any foundation was made for the introduction in evidence of that testimony, and it is immaterial so far as this case is concerned as it affects the defendants.

I call particular attention to the fact that Mr. Tucker testified specifically that he met Collins after he bought all his stock, and therefore it could have no probative value in the establishing of the scheme or the continuance thereof.

The Court: That motion will be denied.

Mr. Cannon: Exception. I will move on behalf of all defendants to strike the testimony of the witness Shomate on the ground that so far as all defendants are concerned, that it embraces the transaction, has to do with the transaction which is in no way mentioned in the indictment. There is no

charge in this indictment to the effect that we would assume to convey property to which there was no title to any of the persons. (Tr. 1076)

I assume the only purpose of the testimony of Mr. Shomate was interrogation of the witness by the prosecution, indicating that he was directed toward establishing the lack of record titles in Gordon at the time he made the Millener lease, and that not having charged the defendants in the indictment whatever, it becomes immaterial and irrelevant. It has no bearing on the issues in this case and is highly prejudicial.

I make that motion on behalf of all defendants for that reason, and I make it further on behalf of all defendants except [13] Gordon, on the ground that the transaction is entirely hearsay, and as to the rest of the defendants, it is also highly prejudicial.

In view of the fact that I don't want this Court or the Appellate Court to feel that I haven't called to the Court's attention the details of the transaction, if your Honor wants me to refresh your recollection as to the testimony, I will be glad to do that.

The Court: It was the testimony of the County Recorder, wasn't it?

Mr. Cannon: Yes, the County Recorder. He testified on the afternoon of July 13.

The Court: I will reserve my ruling on that. (Tr. 1077)

* * *

The Court: The motions submitted to the Court

yesterday are denied. That includes the motion to strike the testimony by Mr. Shomate.

Mr. Cannon: May we have an exception to them? Also I understand, just so the record will be clear, that the motions were also directed to the dismissal of each and every count separately, and to the indictment as a whole?

The Court: Yes, that would be included. (Tr. 1163)

Each and all of the foregoing Assignments are made by Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, jointly and severally, as to each of said Assignments, and as to each of said defendants.

Wherefore, the said defendants, Sidney Fischgrund, James H. Collins and Christopher E. Schirm, by reason of the errors aforesaid, jointly and severally pray that the judgment and the sentences against and upon them may be reversed and held for naught.

SIDNEY FISCHGRUND,
JAMES H. COLLINS,
CHRISTOPHER E. SCHIRM.
CANNON & CALLISTER.

By DAVID H. CANNON.
BEN L. BLUE,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 9, 1944. [14]